

<p style="text-align: right;">102</p> <p>1 someone mentioned the Prairie State case --</p> <p>2 this plant would not be built without that</p> <p>3 accommodation from those two utilities in</p> <p>4 this case. Because you simply can't run the</p> <p>5 risk of not having fuel in a location like</p> <p>6 that.</p> <p>7 JUDGE SHEEHAN: It was said certain of</p> <p>8 the facts you just provided us are not in the</p> <p>9 record. If it's not in the record, what are we</p> <p>10 supposed to do with that? It should be in the</p> <p>11 record. If it's not, how can we consider it?</p> <p>12 MR. FINTO: I think it is in the</p> <p>13 record to a certain extent, and that is they</p> <p>14 talk about the harsh weather and they explain</p> <p>15 the fact that deliveries are difficult in the</p> <p>16 wintertime, that it will be very difficult for</p> <p>17 the wood to come in. That's why we have the</p> <p>18 backup coal --</p> <p>19 JUDGE SHEEHAN: But why isn't it</p> <p>20 difficult for the coal to come in?</p> <p>21 MR. FINTO: I think it's -- one of the</p> <p>22 points I just mentioned is the fact that the</p>	<p style="text-align: right;">104</p> <p>1 wanted it in silos in certain locations. So</p> <p>2 that was an accommodation that was made. So</p> <p>3 we've got certain limitations on just</p> <p>4 stockpiling wood.</p> <p>5 JUDGE SHEEHAN: Let me ask it this</p> <p>6 way. What is your argument for what NMU did to</p> <p>7 accommodate the Clean Air Act's mandate that</p> <p>8 clean fuels be considered?</p> <p>9 MR. FINTO: I think basically if you</p> <p>10 look at what they have proposed here, it is a</p> <p>11 very clean plant. They're talking about burning</p> <p>12 a renewable fuel with wood, which everybody I</p> <p>13 think has to agree is cleaner than coal. They</p> <p>14 said this is our primary fuel. If you look at</p> <p>15 the source obligation rules, they've got to</p> <p>16 construct that plant and operate it in</p> <p>17 accordance with their current application.</p> <p>18 JUDGE SHEEHAN: But it's not the</p> <p>19 primary fuel if you look at the permit, which</p> <p>20 says 22 days in a month are allowed for coal.</p> <p>21 So rhetorically, yes, it sounds great for wood,</p> <p>22 but the facts don't seem to back that up when</p>
<p style="text-align: right;">103</p> <p>1 utilities are nearby. They're in Marquette.</p> <p>2 JUDGE SHEEHAN: They weren't told</p> <p>3 that. The record shows nothing to that effect.</p> <p>4 MR. FINTO: I understand. I</p> <p>5 understand. But I'm just saying if that is part</p> <p>6 of what the understanding is, if this is an</p> <p>7 accommodation by these local utilities, they're</p> <p>8 in the city itself --</p> <p>9 JUDGE SHEEHAN: You make a number of</p> <p>10 points in your brief on the redesign issue, that</p> <p>11 there were would be transport difficulties,</p> <p>12 stockpile difficulties, boiler feed</p> <p>13 difficulties, none of which I saw were in the</p> <p>14 record. But is there not some adjustment, as</p> <p>15 Judge Posner put in the Sierra Club case, some</p> <p>16 adjustment that could be made to deal with the</p> <p>17 realities you say are out there on the ground to</p> <p>18 get cleaner fuel?</p> <p>19 MR. FINTO: I think the answer with</p> <p>20 respect to bringing the wood waste, it is on the</p> <p>21 record there were complaints about odor. They</p> <p>22 didn't want stockpiles of wood everywhere. They</p>	<p style="text-align: right;">105</p> <p>1 push comes to shove.</p> <p>2 MR. FINTO: I think what -- excuse me.</p> <p>3 I, you know, think what happened, Your Honor, is</p> <p>4 that if you're looking at the worst-case</p> <p>5 scenario, what do we have to permit here? And</p> <p>6 that's what they looked at. They said, look, if</p> <p>7 we're going to burn wood, that's not going to be</p> <p>8 the issue. When we burn coal, that's our worst</p> <p>9 case, that's what we have to look at the</p> <p>10 reasonably foreseeable workspace scenario, and</p> <p>11 that's what we're permitting here. And that's</p> <p>12 why it's based on burning coal.</p> <p>13 Now, the preference of the</p> <p>14 university, without a doubt, is to burn wood</p> <p>15 whenever they can.</p> <p>16 JUDGE SHEEHAN: Well, do you drive</p> <p>17 down to the worst-case scenario, which could be</p> <p>18 very dirty fuel, or do you drive up to BACT, the</p> <p>19 best available? Which is it? It sounds like</p> <p>20 there's a tension there.</p> <p>21 MR. FINTO: I think that there is a</p> <p>22 certain amount of tension when you're looking at</p>

<p style="text-align: right;">106</p> <p>1 fuel flexibility in these cases. I think that  2 what we're looking at here is a situation where  3 this plant has complied with the PSD  4 regulations. It could burn -- the BACT analysis  5 indicates that this is -- the numbers from the  6 initial indication for BACT. The dispersion  7 model is done. It shows that the plant will not  8 cause or contribute to a violation of NAAQS. So  9 it does satisfy the requirements of the  10 lawmakers, too.</p> <p>11 With respect to the fuels, another  12 comment was made about Prairie State. In  13 this case, they're sort of getting this  14 lifeline into this plant for the coal as a  15 backup from the usual utility. And it's  16 similar in Prairie State in the sense that  17 there was, in that case, a conveyor belt that  18 came from a mining plant offline into the  19 plant. And here what we have are two  20 locations in which the can get coal; they're  21 sort of at the mercy of these utilities and  22 having to supply what they have a lifeline</p>	<p style="text-align: right;">108</p> <p>1 A number of things were identified  2 as not being possible. The two power plants  3 in town the only source of coal, you can't  4 truck it in from anywhere else, there's no  5 rail line, or a coal transfer point where it  6 can be taken off some other contractor. A  7 number of things, other possibilities, that  8 all should have been identified in step 1 of  9 the top-down BACT analysis. And if there was  10 a not possible or it's too expensive to truck  11 fuel a certain distance, all those things are  12 dealt with in a proper top-down BACT  13 analysis, either in technological feasibility  14 or a cost effectiveness or in one of the  15 later steps.</p> <p>16 On the issue of increment analysis  17 and Presque Isle, DEQ suggested that Sierra  18 Club asked the Board to rewrite the  19 regulator. That's not the case. Asking that  20 the regulation be applied as it's currently  21 written. As it's currently written, it  22 states the following are not included in the</p>
<p style="text-align: right;">107</p> <p>1 there -- that there are really no other  2 options.</p> <p>3 Given the distance, this is within  4 a mile, and those are the only options that  5 they have.</p> <p>6 JUDGE SHEEHAN: I think time has  7 expired, but you had rebuttal time, is that  8 right?</p> <p>9 MR. FINTO: Correct.</p> <p>10 JUDGE SHEEHAN: Mr. Bender?</p> <p>11 MR. BENDER: Thank you, Your Honor.</p> <p>12 In response to a number of new facts that were  13 raised here during argument today, Sierra Club  14 did not have the benefit of those facts or any  15 of these analysis that apparently was implicit  16 according to DEQ. If we had, we could have been  17 more specific even in our comments. We could  18 have addressed those issues more specifically.  19 But still, I think even with the facts, if all  20 those representations made today are true, I  21 still think that the permit analysis was  22 sufficient.</p>	<p style="text-align: right;">109</p> <p>1 baseline concentration and effective  2 applicable maximum allowable increase.  3 Actual emissions as defined in B-21 of this  4 section from any major stationary source on  5 which construction commenced. It does not  6 say emissions from the construction of. It  7 doesn't say emissions from the modification  8 increases. It says actual emissions from the  9 source. Source is defined as the unit or the  10 boiler, the entire facility in 52(21)(b),  11 definition of --</p> <p>12 JUDGE SHEEHAN: So what does that do  13 to the statement in the manual on page C-10, the  14 NSR manual, that emission increases that consume  15 increment are those occurring after the  16 baseline.</p> <p>17 MR. BENDER: It's true for resource  18 baseline data. The increases that occur  19 afterwards at sources that don't fall within the  20 prior section, a major source baseline  21 provision. So for example, under  22 52.21(b)(13)(2)(b), in that section, increases</p>

<p style="text-align: right;">110</p> <p>1 is discussed specifically. I don't know from  2 the NSR Manual if that was what was intended to  3 be referenced or not. I do know that the plain  4 language of the regulation makes the distinction  5 between major sources -- commence construction  6 after major source baseline data, where the  7 actual emissions consuming increment, and after  8 the minor source baseline date increases and  9 decreases effectively.</p> <p>10 Regarding lower sulfur coal, simple  11 questions of whether coal at the lower sulfur  12 content, 45 and other coals, were available  13 as referenced in part of the review documents  14 that DEQ did. The answer is we don't know.  15 We don't know if those are available or not  16 available, because DEQ did not identify that  17 in step 1 and deal with it in a top-down BACT  18 analysis.</p> <p>19 There are a number of potential  20 sources for other cleaner coals in the Upper  21 Peninsula. But instead of identifying them  22 and discussing whether or not those could be</p>	<p style="text-align: right;">112</p> <p>1 point is that it's the permit applicant and then  2 the permit authority's job to identify those.</p> <p>3 I think DEQ has conceded here today  4 that it didn't do that. It just assumed. It  5 just assumed that coal for one of these two  6 power plants would be burned. And it assumed  7 that the coal would have the highest sulfur  8 content that either or those two plants is  9 authorized to burn.</p> <p>10 There's also discussion on why  11 snowfall in Northern Michigan makes it  12 difficult to deliver wood, biomass fuel, but  13 it does not make it difficult or impossible  14 to deliver coal fuel. The record doesn't  15 indicate it. And in response to comments,  16 there was no indication -- in response to  17 comments was when DEQ identified the snowfall  18 as the problem, and actually identified  19 snowfall at two different months: April of  20 '07, April of '08 as months with a lot of  21 snowfall.</p> <p>22 It did not identify where they were</p>
<p style="text-align: right;">111</p> <p>1 used at Northern Michigan, DEQ just ignored  2 that and just assumed that one of two coals  3 was going to be burned.</p> <p>4 JUDGE SHEEHAN: Did you point to any  5 of those other sources in your comments?</p> <p>6 MR. BENDER: We didn't because we  7 don't have the information the DEQ has. It's  8 under the New Source review manual, it's DEQ --  9 it's actually the permit applicant's obligation  10 first, and then DEQ's obligation to do an  11 exhaustive search of potentially applicable  12 pollution-control options, which includes  13 cleaner fuel. That was not done.</p> <p>14 JUDGE SHEEHAN: But I thought I heard  15 you to say you knew of other sources than the  16 two selected by NMU.</p> <p>17 MR. BENDER: We know that there are  18 coal-burning facilities generally in Northern  19 Wisconsin, and we know that there are coal  20 terminals where, of course, taken off barges and  21 stockpiles. We don't know what the coal sulfur  22 content is or is not at any of those. And the</p>	<p style="text-align: right;">113</p> <p>1 getting biomass fuel from. They didn't  2 identify how far away it was, and it didn't  3 identify other storage possibilities in town,  4 parking lot, vacant lot, another industrial  5 facility that could handle or store that  6 biomass material. Again, it's something  7 that's not in the record. So step 1 top-down  8 BACT analysis was not completed as intended  9 in the NSR Manual.</p> <p>10 There's also a discussion from DEQ  11 on how it is assured -- DEQ is assured that  12 SO2 control will be achieved at a constant  13 rate of emission, assuming 92 percent control  14 of SO2. This is the first time Sierra Club  15 had heard that it was assured because of the  16 NSPS standard. As I sit here today, that  17 doesn't sound like a correct interpretation  18 of NSPS for the permit to meet, but I don't  19 have that NSPS section memorized. So if the  20 Board decides to consider that argument,  21 Sierra Club respectfully requests to be able  22 to brief that small issue.</p>

<p style="text-align: right;">114</p> <p>1       There's also -- DEQ made I think</p> <p>2       the concerning remark that if it was asked</p> <p>3       to, or a remand occurred to justify the</p> <p>4       pre-construction monitoring that was done,</p> <p>5       that DEQ would just write a letter to the</p> <p>6       applicant saying the monitoring is fine. It</p> <p>7       meets their criteria.</p> <p>8       You know, from the distance of the</p> <p>9       monitors compared to the PSD monitoring</p> <p>10      guidelines that it can't meet the criteria.</p> <p>11      The guidelines are clear on what's -- what</p> <p>12      meets the location criteria to take the first</p> <p>13      criteria. For example, we know, as we</p> <p>14      discussed earlier today, as we addressed in</p> <p>15      our brief, 10 kilometers giving DEQ and NMU</p> <p>16      the benefit of the doubt and all the</p> <p>17      assumptions in that, in the three</p> <p>18      possibilities in the PSD monitoring -- giving</p> <p>19      them the benefit of the doubt, 10 kilometers</p> <p>20      is the distance.</p> <p>21      There's no argument. There's no</p> <p>22      justification made that the monitors can meet</p>	<p style="text-align: right;">116</p> <p>1       permit. There are also some significant</p> <p>2       issues, especially about clean fuel, that if</p> <p>3       the applicant and DEQ's interpretations are</p> <p>4       taken and accepted -- have significant</p> <p>5       implications nationally for other permitting</p> <p>6       agencies considering clean fuels. Thank you.</p> <p>7       JUDGE REICH: I have one question. If</p> <p>8       I understood Mr. Gordon correctly, he indicated</p> <p>9       that the question of whether MDEQ should have at</p> <p>10      least considered establishing different limits</p> <p>11      for the parts of the year where there was no</p> <p>12      issue about availability of wood due to snows,</p> <p>13      that issue was not one raised in comments on the</p> <p>14      draft permit. Is that correct?</p> <p>15      MR. BENDER: I don't --</p> <p>16      JUDGE REICH: Or let me ask more</p> <p>17      specifically. Did Sierra Club raise that issue?</p> <p>18      MR. BENDER: Sierra Club raised the</p> <p>19      issue of using clean fuels and maximizing clean</p> <p>20      fuels in establishing the BACT limit. DEQ's</p> <p>21      response was -- in April of '07 and April of</p> <p>22      '08, there were heavy snowfalls which may</p>
<p style="text-align: right;">115</p> <p>1       that criteria.</p> <p>2       And there was also a discussion on</p> <p>3       how DEQ just knows -- knows what air quality</p> <p>4       is like and knows that the monitors are</p> <p>5       representative. There's no information to</p> <p>6       support that. There's no monitoring data</p> <p>7       that we could find for Marquette County,</p> <p>8       Michigan at all.</p> <p>9       There are other regional monitors</p> <p>10      in Michigan which were not used. We don't</p> <p>11      think those would meet the location criteria</p> <p>12      either. But we don't know why monitors that</p> <p>13      were used were used, and why the monitors</p> <p>14      that were not used were not used. And so</p> <p>15      even if the 10 kilometer did not apply, we</p> <p>16      still don't know -- the public is left in the</p> <p>17      dark as to why the monitoring data that was</p> <p>18      used is representative of monitoring the</p> <p>19      ambient air quality in the area that'll be</p> <p>20      affected by the source.</p> <p>21      And just in conclusion, there are a</p> <p>22      number of procedural problems with this</p>	<p style="text-align: right;">117</p> <p>1       prevent wood from being delivered. And it's our</p> <p>2       position that that analysis wasn't done</p> <p>3       according to a top-down process and shouldn't be</p> <p>4       given any credence. But for argument's sake,</p> <p>5       even if there are periods of the year where</p> <p>6       snowfall prevents wood trucks but not coal</p> <p>7       trucks from reaching the plant, that the proper</p> <p>8       way to deal with it is similar to how start-ups</p> <p>9       and shut-downs are dealt with. If emission</p> <p>10      rates, BACT limits can't be met during those</p> <p>11      times, there's a special carve-out for them with</p> <p>12      boundaries places around them.</p> <p>13      JUDGE REICH: But are you saying, and</p> <p>14      maybe Mr. Gordon can react to this as well, that</p> <p>15      in terms of the draft permit, there was no</p> <p>16      articulation of this problem of getting wood in</p> <p>17      the winter that was used to explain why the</p> <p>18      permit limits were proposed as they were.</p> <p>19      MR. BENDER: Not very clearly. And</p> <p>20      there may be some -- I don't recall everything</p> <p>21      in the application or record. But not very</p> <p>22      clearly, and frankly, the response to comments</p>

30 (Pages 114 to 117)

<p style="text-align: right;">118</p> <p>1 isn't very clear either for how this weather  2 emergency really happens, how often it actually  3 happens. And in fact, DEQ had to point to  4 weather data on the Internet outside the record  5 in its response in support of this position.  6 And so there's -- if there's anything, it wasn't  7 much, and even with this response to comments  8 it's not much. Thank you.  9 MR. GORDON: Very briefly, just to  10 really address that last question. The draft  11 permit and the fact sheet that went out with the  12 draft permit at the beginning of the public  13 comment period identified the number of days  14 that the boiler would burn wood, the number of  15 days that the boiler would burn coal. And look  16 at the Petitioners' comments; they didn't  17 address that point at all.  18 They addressed the point that we  19 shouldn't require a particular -- this  20 1.5 percent sulfur content is something that  21 was not correct, and that we should require  22 the -- DEQ should be requiring all wood and</p>	<p style="text-align: right;">120</p> <p>1 then, again -- you know, as to this issue as to  2 whether actual emissions should be -- from the  3 entire plant should be excluded from the  4 analysis of whether -- that all actual emissions  5 from the facility are increment-consuming if the  6 facility makes a modification after the major  7 source baseline date. Again, I think the  8 Petitioner's argument is reading out of the  9 definition of actual emissions that portion that  10 talks about -- mentions that -- or associated  11 with construction that occurred after the major  12 source baseline date. I don't think there's any  13 basis for that argument. It requires ignoring  14 the particular provision on which they're  15 relying.  16 Unless there are other questions, I  17 don't have any other points to raise. I  18 think I addressed all their points that they  19 raised in rebuttal, frankly, in the thorough  20 discussion that we had previously.  21 Thank you.  22 JUDGE REICH: Thank you. Mr. Finto?</p>
<p style="text-align: right;">119</p> <p>1 no coal, but this particular mix of wood and  2 coal and that it should be in the summer  3 months, it should be more -- it should be all  4 wood because the fuel delivery disruptions is  5 not at issue in the summer months. That  6 point was not raised at all.  7 And the issue was teed up prior to  8 the start of the public comment period. It's  9 our position that the issue was not preserved  10 for appeal.  11 JUDGE REICH: In a sense, it was clear  12 that the way you were proceeding was driven in  13 part by unavailability of wood in winter months.  14 MR. GORDON: Correct. And  15 specifically, the 8 days of wood and 22 days of  16 coal has actually been the fact sheet itself.  17 That breakdown of how much wood and how much  18 coal.  19 JUDGE REICH: Right, but also the  20 rationale for it.  21 MR. GORDON: Yes. I believe, yes, it  22 is. It's my recollection that it is, yes. And</p>	<p style="text-align: right;">121</p> <p>1 MR. FINTO: I just wanted to make a  2 couple points. There were some questions about  3 the increment and some discussion about the  4 language in 52.21(b)(13)(i). The baseline does  5 include the air quality. We put the air quality  6 on the baseline date. There's been some  7 discussion about 52.21(b)(13)(i)(a) which says  8 you include the actual emissions from  9 construction after the baseline date is not  10 included.  11 And then 52.21(b)(13)(i)(b), which  12 I think is the important one here, says that  13 actual increases or decreases that occur  14 after the minor source baseline date are not  15 included in the baseline. And that's the  16 provision that allows for the expansion of  17 increment. And that is why this netting  18 process is used. And that is the basis for  19 what Michigan did. Michigan's process is  20 completely consistent with what EPA said to  21 do in the proposed clarification to the  22 increment modeling.</p>

<p style="text-align: right;">122</p> <p>1 With respect to fuels, there was</p> <p>2 some economic analysis done in the permit</p> <p>3 application. There was also a follow-up</p> <p>4 letter that showed economic analysis. So</p> <p>5 consumption of coal is not purely a function</p> <p>6 of the weather. It was also a function of</p> <p>7 economics. And subsequent to the permit</p> <p>8 application, there was an additional</p> <p>9 submittal.</p> <p>10 Finally, there were some questions</p> <p>11 about what to do with the record. Well, the</p> <p>12 question we go back to is clear error, and</p> <p>13 that is the question about whether the</p> <p>14 information here reflects whether there would</p> <p>15 have been a different permit decision</p> <p>16 reached. And as Mr. Gordon put out, it's</p> <p>17 just a matter of documentation. It seems to</p> <p>18 us that that's not clear error. Thank you.</p> <p>19 JUDGE REICH: I just wanted to make</p> <p>20 sure I heard correctly. Did you say that the</p> <p>21 decision on the mix of coal versus wood was in</p> <p>22 part a question of economics?</p>	<p style="text-align: right;">124</p> <p>1 what you refer.</p> <p>2 JUDGE REICH: With Judge Sheehan's</p> <p>3 indulgence, can I ask Mr. Gordon to answer a</p> <p>4 question -- in the determination that MDEQ made</p> <p>5 on this issue, were you relying on the economics</p> <p>6 as well as the potential unavailability of fuel?</p> <p>7 MR. GORDON: I'm not aware of DEQ</p> <p>8 relying on the economic issue as its basis.</p> <p>9 JUDGE REICH: Okay.</p> <p>10 JUDGE SHEEHAN: This concludes our</p> <p>11 argument. Thank you all very much for your</p> <p>12 participation.</p> <p>13 (Whereupon, at approximately</p> <p>14 12:04 p.m., the ORAL ARGUMENT was</p> <p>15 adjourned.)</p> <p>16 * * * * *</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>
<p style="text-align: right;">123</p> <p>1 MR. FINTO: There was some economics.</p> <p>2 My understanding is that the MDEQ did ask for</p> <p>3 some additional information that was submitted.</p> <p>4 It was alluded to in the cover letter with the</p> <p>5 original permit application on February 5, 2007.</p> <p>6 And if you'd like, I can make sure that I can</p> <p>7 get to you subsequent to this the letter that</p> <p>8 had the other information in it.</p> <p>9 JUDGE SHEEHAN: Are you referring to</p> <p>10 the -- I presume to the permit addendum from</p> <p>11 September of '07?</p> <p>12 MR. FINTO: I believe that's correct.</p> <p>13 JUDGE SHEEHAN: Yes, I think it's the</p> <p>14 last few paragraphs you're talking about there</p> <p>15 in which you say, "Cost effectiveness</p> <p>16 spreadsheet has been included, and it shows</p> <p>17 numbers," I won't repeat them here, "much higher</p> <p>18 than recent BACT cost effectiveness</p> <p>19 determinations." And then it concludes that</p> <p>20 because of cost, no change will be made.</p> <p>21 It seems a rather conclusory</p> <p>22 statement, but we'll look at it. We know to</p>	